STATE OF MICHIGAN
IN THE SUPREME COURT

VECTREN INFRASTRUCTURE SERVICES CORP,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 345462

Court of Claims No. 17-000107-MT

MICHIGAN DEPARTMENT OF TREASURY'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

The Michigan Court of Appeals' March 12, 2020 published decision, on reconsideration, found in favor of Plaintiff, Vectren Services Infrastructure Corporation (Vectren). A copy of that decision is attached. (Ex A.) Treasury filed an application for leave to appeal to this Court. In lieu of granting Treasury's application, this Court vacated the Court of Appeals' opinion and remanded for a determination of whether the statutory apportionment formula was properly applied. (Ex B, MSC 11/25/2020 Order.)

On remand, the Court of Appeals remanded the matter to the Court of Claims to decide this issue. (Ex C, COA 04/19/2021 Remand Order.) The Court of Claims agreed with Treasury's application of the statutory formula. (Ex D, COC 05/25/2021 Remand Op.) On September 30, 2021, the Court of Appeals then issued a published opinion and order agreeing that the statutory apportionment formula was properly applied, but that it is unconstitutional as applied against Vectren. (Ex E, COA 09/30/2021 Remand Op.) Accordingly, the Court of Appeals remanded back to the Court of Claims for proceedings consistent with both its original opinion and its opinion on remand.

This Court has jurisdiction over Treasury's application for leave to appeal under MCR 7.303(B). Treasury's instant application is timely filed within 42 days of the lower court's decision. (Ex E.)

STATEMENT OF QUESTIONS PRESENTED

1. The Court of Appeals determined that Plaintiff is entitled to alternative apportionment, which is to be determined "by the parties." The decision creates a court-sponsored negotiation process that affects tax administration and Michigan business taxpayers. Does the Court of Appeals' opinion implicate a significant public interest as to warrant this Court's review?

   Appellant's answer: Yes.

   Appellee's answer: Presumably No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

2. Under the Michigan Business Tax Act (MBTA) and Corporate Income Tax Act (CITA), taxpayers are responsible for their tax liability in that tax year, and bear the burden of proving that the standard alternative apportionment grossly distorts their business activity in Michigan. Both statutes give Treasury the authority to approve an alternative apportionment method. Does the Court of Appeals' decision involve legal principles of major jurisprudential significance to this State when:

   a. The Court below examined prior years' purported business activity to determine the constitutionality of taxation in a given tax year, and granted alternative apportionment despite a lack of evidence showing what portion of the entity's income is attributable to Michigan?

   b. The Court contradicted case law from the U.S. Supreme Court and this Court that reject "geographic accounting?"

   c. The Court decided that a single sales-factor apportionment formula was unconstitutional as applied for the first time?

   d. The Court's decision runs counter to the presumption of taxation in Michigan tax law, effectively relieving taxpayers of the burden to defeat this presumption?

e. The Court remanded the matter for "the parties" to determine a method of alternate apportionment, despite the plain language of the statute, which gives Treasury the exclusive authority to approve any alternative apportionment?

Appellant's answer:	Yes.
Appellee's answer:	Presumably No.
Trial court's answer:	Did not answer.
Court of Appeals' answer:	Did not answer.

3. The Court of Appeals' decision contradicts the MBTA and CITA, as well as construing case law. Is the decision plainly erroneous and likely to cause material injustice?

Appellant's answer:	Yes.
Appellee's answer:	Presumably No.
Trial court's answer:	Did not answer.
Court of Appeals' answer:	Did not answer.

STATUTES INVOLVED

MCL 208.1201

(1) Except as otherwise provided in this act, there is levied and imposed a business income tax on every taxpayer with business activity within this state unless prohibited by 15 USC 381 to 384. The business income tax is imposed on the business income tax base, after allocation or apportionment to this state, at the rate of 4.95%.

MCL 208.1105

(1) "Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but does not include the services rendered by an employee to his or her employer or services as a director of a corporation. Although an activity of a taxpayer may be incidental to another or to other of his or her business activities, each activity shall be considered to be business engaged in within the meaning of this act.

MCL 208.1301

(2) Each tax base of a taxpayer whose business activities are confined solely to this state shall be allocated to this state. Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state shall be apportioned to this state by multiplying each tax base by the sales factor calculated under [MCL 208.1303].

MCL 208.1303

(1) Except as otherwise provided in subsection (2) and section 311, the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year and the denominator of which is the total sales of the taxpayer everywhere during the tax year.

MCL 208.1309

(1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the treasurer may require the following, with respect to all or a portion of the taxpayer's business activity, if reasonable:

(a) Separate accounting.

(b) The inclusion of 1 or more additional or alternative factors that will fairly represent the taxpayer's business activity in this state.

(c) The use of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.

* * *

(3) The apportionment provisions of this act shall be rebuttably presumed to fairly represent the business activity attributed to the taxpayer in this state, taken as a whole and without a separate examination of the specific elements of either tax base unless it can be demonstrated that the business activity attributed to the taxpayer in this state is out of all appropriate proportion to the actual business activity transacted in this state and leads to a grossly distorted result or would operate unconstitutionally to tax the extraterritorial activity of the taxpayer.

MCL 208.1115(1)

(1) "Sale" or "sales" means, except as provided in subdivision (e), the amounts received by the taxpayer as consideration from the following:

(a) The transfer of title to, or possession of, property that is stock in trade or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business. For intangible property, the amounts received shall be limited to any gain received from the disposition of that property.

(b) The performance of services that constitute business activities.

(c) The rental, lease, licensing, or use of tangible or intangible property, including interest, that constitutes business activity.

(d) Any combination of business activities described in subdivisions (a), (b), and (c).

INTRODUCTION

In a published decision, the Court of Appeals swept away decades of Michigan tax jurisprudence—both substantive and procedural. This decision created a new world in which taxpayers who are unhappy with their tax liability may simply assert, without evidence, that the current value of their business is largely attributable to past business operations in other states. What will they get for their unsubstantiated claims under the Court of Appeals' published decision? A court-sanctioned negotiation with the Department of Treasury to determine a more tax-friendly apportionment percentage.

This, despite well-established tax law holding that Michigan's tax scheme taxes a specific tax period, places the burden on taxpayers to prove that the standard apportionment formula is inappropriate, and gives Treasury alone the authority to approve any alternative method.

The Court of Appeals' decision warrants this Court's review for three reasons:

(1) This case presents a matter of significant public interest that will affect tax administration for all Michigan business taxpayers, MCR 7.305(B)(2);

(2) This case involves legal principles of major significance to the State's jurisprudence, i.e., the substance and process of alternative apportionment claims, MCR 7.305(B)(3);

(3) The lower court's decision that Vectren is entitled to alternative apportionment based on unproven assertions of business activities in past years is clearly erroneous because taxation relates to a snapshot in time. MCR 7.305(B)(5).

Accordingly, Treasury seeks leave to appeal and requests that this Court reverse the determination that Vectren is entitled to alternative apportionment, or if it finds that it is, that any such method must be approved by Treasury alone.

STATEMENT OF FACTS AND PROCEEDINGS

Minnesota Limited Inc.'s business operations

Minnesota Limited, Inc. (MLI) was an S-corporation organized under the laws of Minnesota. (Pl's App[1] Vol VII, p 93, ¶ 1 (Am Compl); App[2] Vol I, p 5 (Leines Dep Tr).) Up to and through the 2011 tax year, MLI's business operations consisted of oil and gas pipeline construction, repair and HAZMAT response services. (Pl's App Vol II, pp 5–6, Resp No. 2 (Pl's Resp to Def's 1st Disc Req); *Id.* at Vol VII, p 94, ¶ 3 (Am Compl).) Specifically, the company provided construction services to natural gas, crude oil, refined products, and hydrocarbon industries in the United States. (*Id.* at Vol II, pp 5–6, Resp No. 2.) Over the years, the company continued to expand its territorial and customer base, and eventually was licensed and did work in approximately twenty-four states. (App Vol I, pp 3–4 (Leines Dep Tr).)

In March 2010, the shareholders of MLI, siblings Christopher Leines and Paulette Britzius, were looking to sell MLI. Ms. Britzius was experiencing health issues and wanted to "get out of the business." (*Id.* at 6.) Therefore, Mr. Leines "either [ ] had to buy her out, or we had to shut the company down or look for a seller." (*Id.* at 8.) Further, "[they] were kind of being pursued too as well." (*Id.* at 7.)

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[1] All Plaintiff's appendix (Pl's App) citations made throughout this application refer to the appendixes connected with Plaintiff's brief filed in the Court of Appeals on December 7, 2018.

[2] All appendix (App) citations made throughout this application refer to the appendixes connected with Defendant's brief filed in the Court of Appeals on March 8, 2019.

The shareholders retained Green Holcomb & Fisher to assist them in selling their business. (*Id.* at 2–3, 9; Pl's App Vol VII, p 94, ¶ 7 (Am Compl).) To promote the business, Green Holcomb & Fisher prepared a Memorandum entitled *Project Cadillac Confidential Memorandum* (Offering Memo), that contained information obtained from MLI (among other sources).[3] (Pl's App Vol II, pp 70–164 (Offering Memo); App Vol I, pp 9–10 (Leines Dep Tr).) Mr. Leines reviewed the memorandum "to make sure it [was] as accurate as we could make it for the potential buyers," and ultimately approved it. (App Vol I, pp 9–15 (Leines Dep Tr).) This Offering Memo was given to potential buyers, including Vectren, to convey information concerning MLI's business, some of its core customers,[4] and its industry. (*Id.* at 16–21.)

While Vectren contends that MLI's business operations in Michigan had been occasional and sporadic in the past several years, there were various opportunities for MLI in Michigan at the time it began looking for purchasers. Specifically, according to its Offering Memo, MLI stood to benefit from both high fuel prices and "renewed domestic attention to difficult to access oil and gas deposits and shale recovery techniques." (Pl's App Vol II, pp 75, 81.) "Unconventional gas production (which includes 'shale gas') now represents approximately 40% of all U.S. gas

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[3] The Offering Memo states the following: "[i]nformation contained herein has been obtained from the Company and other sources which are believed to be reliable." (Pl's App Vol II, p 71 (Disclosure page).) One such other source identified in the Offering Memo is *IBIS Pipeline Construction in the U.S. Report, dated January 4, 2010*. (Pl's App Vol II, p 89.)

[4] MLI did not list all of its customers in the Offering Memo as a precaution that other competitors would review the document for recognizance purposes. (App Vol I, p 16 (Leines Dep Tr).)

production . . . ." (*Id.* at 81.) "Much of this unconventional oil and gas production, including the Marcellus and Antrim [located in Michigan] Shale formations, are right in [Minnesota Limited's] geographic sweet spot." (*Id.*) In addition, MLI claimed it had substantial capabilities to expand its operations "with an emphasis on expansion both west of the Mississippi and areas in the Great Lakes region." (*Id.* at 75.)

Produced in the Offering Memo, figure 1 below identifies certain new shale gas basins, including Michigan's Antrim shale basin. (*Id.* at 81.)

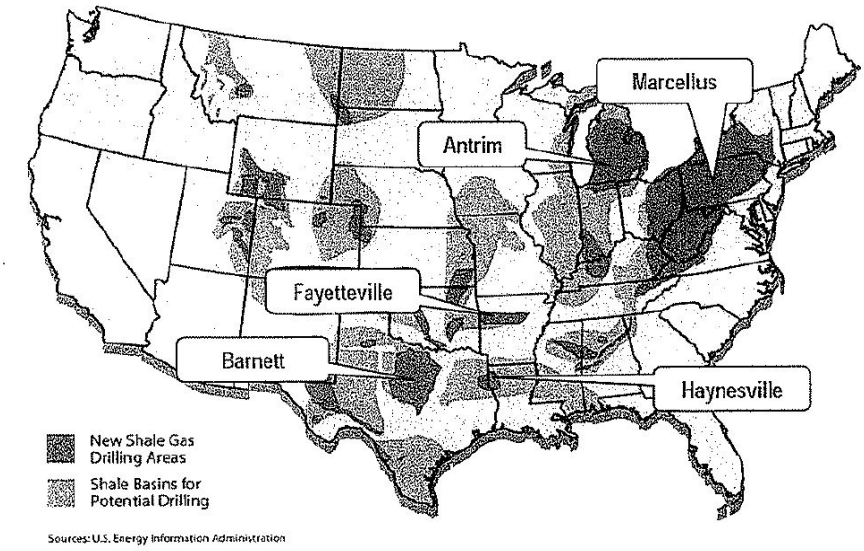

Figure 1. Obtained from MLI's Project Cadillac Confidential Memorandum

Further, the Offering Memo states that "[m]uch of the natural gas pipeline construction activity is supporting an increasing reliance on natural gas as a feedstock for electricity generation." (*Id.* at 80.) Over 50% "of all new electricity generation in the U.S. in 2008 used natural gas as a feedstock and . . . this trend [was expected] to continue for the next decade." (*Id.*) Consumers Energy, a Michigan Corporation that operates primarily in Michigan (App Vol III, p 363

(Consumers 2011 10-K)), was a major customer of MLI at the time of selling its business. (App Vol I, p 23 (Leines Dep Tr); Pl's App Vol IV, p 72, Part 4.23 (Purchase Agr).)

Also, according to the Offering Memo, MLI had a facility in Illinois that served as a "beachhead for securing work in Illinois, Michigan, Indiana, and Missouri. [MLI] plan[ned] to continue this strategy and [was] evaluating opening two additional locations that would better position it for work in the Great Lakes region and Rocky Mountain region." (Pl's App Vol II, p 117.)

And because MLI performed most of its services in the Midwest, it is directly affected by the Canadian oil industry and production in the Rocky Mountains, which opened construction opportunities in the Great Lakes region. "Canada is the only country that delivers oil to the U.S. by pipeline, and delivers most of this oil from Western Canada through the Midwest into the U.S. pipeline network. In the last decade, there has been significant natural gas pipeline construction between Canada and the Great Lakes region." (*Id.* at 98.) In addition, "[a] significant amount of [MLI's] work is concentrated in the Midwest which is a major pipeline crossroad connecting production in the Rocky Mountain and Western Canada Regions with major markets in the Upper Midwest and east of the Mississippi." (*Id.* at 101.)

Finally, in the summer of 2010, MLI "was engaged by Enbridge Energy ('Enbridge') to respond to a severe oil pipeline rupture that occurred in a tributary of the Kalamazoo River in July of 2010." (Pl's App Vol VII, p 94, ¶ 8 (Am Compl).)

According to Vectren, this project was MLI's largest single contract ever performed in Michigan. (*Id.* at ¶ 9.) "The work commenced in July 2010 and was completed in May 2012." (Pl's App Vol II, pp 9–10, Resp No. 7 (Pl's Resp to Def's 1st Disc Req).) In 2010, approximately 40% of MLI's sales revenue was generated in Michigan compared to everywhere else. (*Id.*) But MLI's former president, Christopher Leines, could not state with any specificity how much equipment was located in Michigan: "[t]here would have been some company equipment on the project in Michigan and a lot of rented equipment from the local Cat dealer and John Deere and such." (App Vol I, p 22.)

Vectren Corporation

Vectren is an energy utilities company that expanded its business in December 2000. Specifically, Vectren acquired Miller Pipeline Corporation (Miller) to provide infrastructure services such as underground pipeline construction, replacement, and repair in order to carry natural gas, liquids, water and wastewater. (App Vol I, pp 31–32 (Vectren 2001 10-K); *Id.* at 93–95 (Banning Dep Tr).) Miller had three distinct lines of businesses:

> (1) A distribution pipeline construction company that constructed pipelines for local distribution companies;
>
> (2) A transmission pipeline construction company, i.e., Miller constructed interstate pipelines generally regulated by Federal Energy Regulatory Commission; and
>
> (3) A water and wastewater rehabilitation business that rehabilitates wastewater and constructs new pipelines. [App Vol I, p 94 (Banning Dep Tr).]

In 2008 through 2011, Vectren believed new shale formations and fracking technology presented profitable opportunities in its infrastructure services business of constructing, replacing, and repairing pipelines. (*Id.* at 99–97.) The industry saw growth in demand for gas transmission construction and pipeline upgrades. (*Id.* at 111–112.) In the United States, new shale formations were discovered, along with new techniques to frack those formations to extract oil, natural gas, and wet gases (ethane, propane, butane). (*Id.* at 99–100.) Vectren looked to expand their business into new territories and increase their customer base, but did not have sufficient management or infrastructure to take advantage of these opportunities. (*Id.* at 96–97, 105, 107–109.)

While Vectren looked to acquire an entity in the industry, MLI approached Vectren about a potential sale. (*Id.* at 96–97.) At the time, Vectren was operating in approximately 20 to 25 states and was looking to expand its territory. (*Id.* at 98.) Although Vectren claims that the Antrim shale formation had nothing to do with purchasing MLI, Vectren's president, Douglas Banning, explained that Vectren was looking for new customers and territories in which those customers work, and that Vectren's lack of a customer base in the Antrim region would be "a plus" insofar as Vectren was trying to expand their territory and customer base. (*Id.* at 103–106, 108.) And MLI's transmission territory included Michigan as shown in figure 2 below. (App Vol I, p 117 (Vectren 2011 8-K Exhibit 99.1).)

Jointly Capitalizing on Development of Natural Gas and Oil in Shale Basins

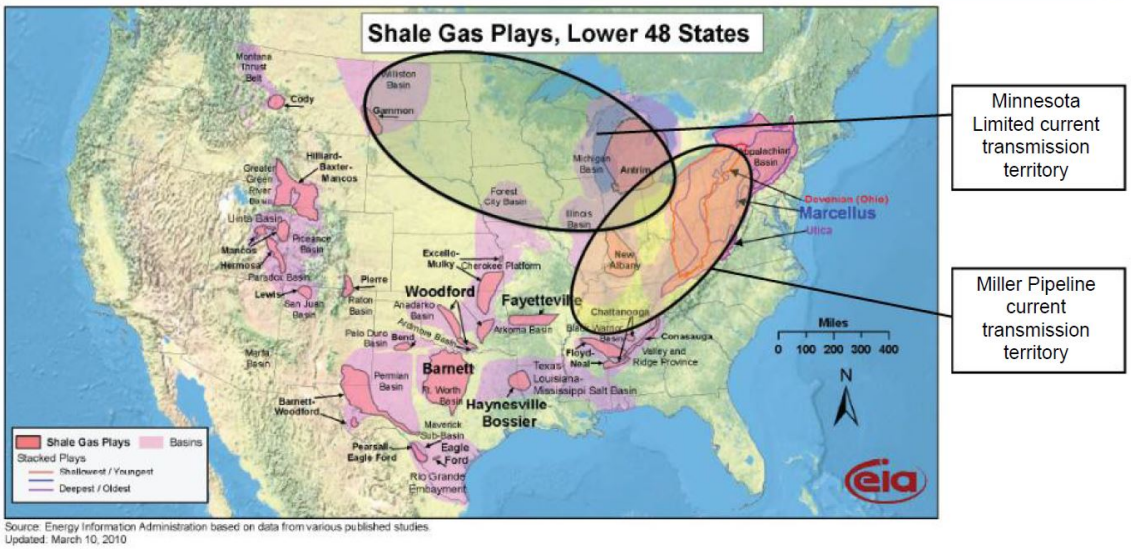

Figure 2. Obtained from Vectren's 2011 Form 8-K attachment.

Between the transmission territories of the two entities, Vectren would be "[p]ositioned well to take advantage of the pipeline construction impacts from shale," including development of natural gas and oil in certain shale basins, including Michigan's Antrim shale basin. (*Id.* at 114–118.) Further, according to Vectren's 2011 Form 8-K, Vectren was aware of MLI's current customers including, but not limited to, Enbridge Energy (which had a significant contract with MLI in 2011) and Consumers Energy (which operates primarily in Michigan). See figure below. (*Id.* at 118; App Vol I, pp 101–102 (Banning Dep Tr).) And while Mr. Banning claimed that Vectren had "more sophisticated market data" than the Offering Memo contained, and that Vectren instead looked to MLI's financials, he admitted that the financials say nothing about MLI's customer base. (App Vol I, pp 110, 113 (Banning Dep Tr).) Instead, Vectren relied "somewhat [on] the offering memorandum," (*id.* at 113), which describes MLI's major customers including

Consumers Energy and Enbridge Energy as shown in figure 3 below. (App Vol I, pp 118 (Vectren 2011 8-K Exhibit 99.1).)

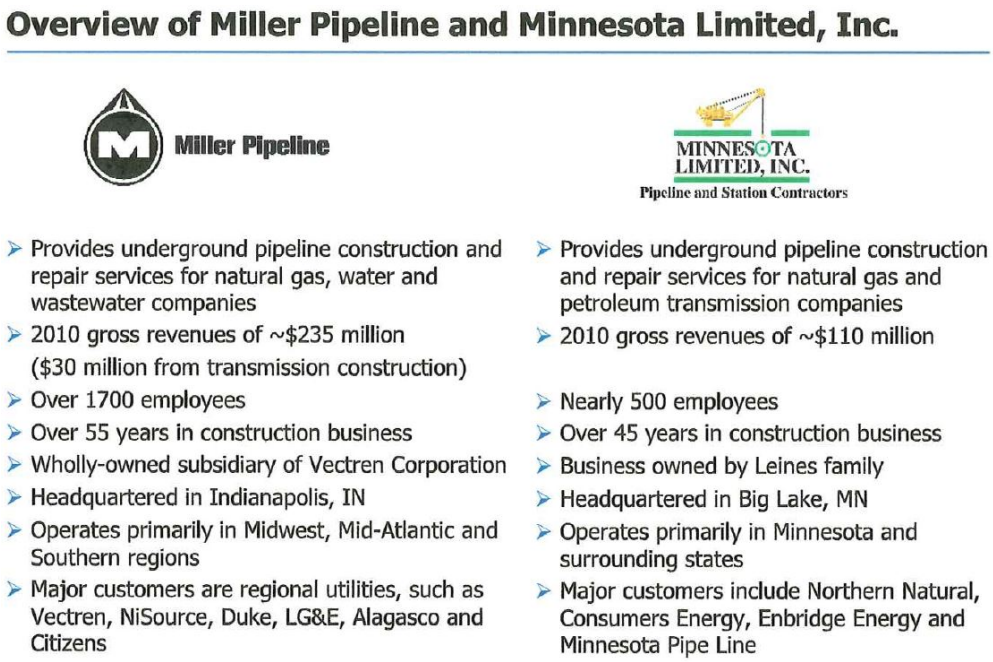

Figure 3. Obtained from Vectren's 2011 Form 8-K attachment.

Vectren believed that acquiring MLI was "[c]onsistent with Vectren's plans to target infrastructure services growth through geographic and market expansion opportunities." (*Id.* at 116.) MLI would "[p]rovide[] access to new customer base and geographic territories for both Miller and Minnesota Limited." (*Id.*) Vectren believed this acquisition positioned it to take advantage of anticipated growth in demand for "gas transmission construction resulting from the need to transport new sources of natural gas and oil found in shale formations and the need to upgrade the nation's aging pipelines." (*Id.* at 159, 192 (Vectren 2011 10-K).)

Vectren's Purchase of MLI

On March 31, 2011, Vectren Corporation, through its wholly owned subsidiary Vectren Infrastructure Services Company, Inc., purchased MLI for approximately $88.6 million ($83.4 million cash and $5.2 million assumption of debt) which included:

- $14.8 million of net working capital;
- $34.4 million of property, plant, and equipment;
- $19.1 million of identifiable intangibles; and
- $20.3 million of implied goodwill.

(App Vol I, pp 128, 159–160, 192–193 (Vectren 2011 10-K); Pl's App Vol III, pp 68–69, ¶ 7.1(e)(ii) (Purchase Agr); Pl's App Vol I, pp 38, 62 (KPMG Draft Val).) Note that goodwill equals the price paid for MLI minus the fair market value of MLI's net identifiable assets and represents the intangible value Vectren expected to realize from MLI over time. (App Vol I, pp 159–160, 192–193 (Vectren 2011 10-K); Pl's App Vol I, p 185 (Hirsch Dep Tr).) In other words, goodwill is a forward-looking concept that considers future value/opportunities.

Valuation of MLI's Intangible Assets

On December 1, 2010, Vectren engaged KPMG to provide a valuation of MLI's intangible assets in connection with the acquisition. (Pl's App Vol I, p 35 (KPMG Draft Val).) KPMG prepared a draft report on August 30, 2011, which was never finalized by KPMG. (*Id.* at 164 (Hirsch Dep Tr).) The purpose of the report was to value intangible assets in order to comply with certain financial reporting

requirements and tax regulatory purposes. (*Id.* at 38 (KPMG Draft Val).) KPMG did not value any other business assets. KPMG also did not value any intangible assets on a state-by-state basis. (*Id.* at 167–174 (Hirsch Dep Tr).) Accordingly, there is no way to ascertain the value of assets, both tangible and intangible, located in Michigan.

In the report KPMG identified three separate intangible assets with a combined valuation of $19,116,000:

- Trade Name was valued at $4,241,000;
- Customer Relationships was valued at $14,588,000; and
- Backlog was valued at $287,000.

(*Id.* at 38, 55, 62 (KPMG Draft Val).) KPMG valued MLI's intangible assets based on future earnings generated by the use of these assets. (*Id.* at 176–177 (Hirsch Dep Tr).)

Specifically, KPMG calculated goodwill by taking the purchase price and subtracting the tangible assets (value provided by MLI) and identified intangible assets (valued by KPMG). (*Id.* at 185; *Id.* at 62 (KPMG Draft Val).) The residual equals goodwill. (*Id.* at 185 (Hirsch Dep Tr).) In short, the valuation of intangible assets was a largely forward-looking analysis.

Vectren's 2011 Michigan Business Tax Return

In 1996, MLI filed an election to be treated as an S-Corporation under Internal Revenue Code (IRC) § 1361. (Pl's App Vol III, pp 55–56, ¶ 4.10(e) (Purchase Agr).) For purposes of MLI's 2011 federal tax liability, MLI and Vectren

jointly elected to treat the sale of MLI's stock as a taxable sale of its assets under federal IRC § 338(h)(10). (Pl's App Vol VII, pp 115–122 (June 2016 Alt Req); *Id.* at Vol III, pp 68–69, ¶ 7.1(e) (Purchase Agr).) Vectren claims "[t]he assets that were deemed sold in the stock sales included [MLI's] capital assets and intangible assets of receivable, retainages, cash, prepaid expenses, inventory and goodwill." (*Id.* at Vol VII, pp 115–122 (June 2016 Alt Req).)

On or about January 13, 2012, MLI filed its Michigan Business Tax (MBT) return for tax period January 1, 2011 through March 31, 2011. (App Vol I, pp 239–248.) While MLI properly included the sale of its business assets in the business income and gross receipts tax bases in its MBT return, it improperly included the sale of its business assets in the denominator of the sales factor apportionment. (Pl's App Vol II, p 25 (AROF); App Vol I, p 239, ln 11b (2011 Michigan Ret).) Similarly, in its request for alternative apportionment, Vectren acknowledged that MLI's tax base included gross receipts and income from the MLI sale. (Pl's App Vol VII, pp 117–118 (June 2016 Alt Req).)

Under the MBTA, a taxpayer with business activities both within and outside of Michigan will apportion its tax base using the sales factor apportionment formula. The sales factor is a fraction, the numerator of which is total sales of the taxpayer made in Michigan during the tax year and the denominator of which is total sales everywhere made by the taxpayer during the tax year. MCL 208.1303. "Sales" is statutorily defined as amounts received by the taxpayer as consideration from:

> The transfer of title to, or possession of, property that is stock in trade or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business.
> [MCL 208.1115(1)(a).]

More, as to service providers, MCL 208.1115(1)(b) defines "sales" as the amounts received by taxpayers as consideration for the "performance of services that constitute business activities."

In its 2010 MBT return, MLI properly included operational sales in both the numerator and denominator of the sales apportionment factor, which did not include the sale of business assets as reported in its 2010 Federal Forms 4797. (App Vol II, p 249, ln 11b (2010 Michigan Ret); Pl's App Vol III, pp 23–30; Pl's App Vol II, p 25 (AROF).) But in its 2011 MBT return, MLI erroneously included in the sales denominator the gain from its federal Schedule D and sale of business assets from its federal Forms 4797. (App Vol I, p 239, ln 11 (2011 Michigan Ret); App Vol II, pp 261–307 (2011 Fed Ret); Pl's App Vol II, p 25 (AROF).) The net effect of this is that the percentage gets smaller as the denominator gets larger.

Thus, MLI attempted to apportion using a smaller sales factor percentage—i.e., 14.9860% to be applied to the 2011 MBT tax base instead of 69.9761%. (App Vol II, pp 310–311 (Audit Workbook); Pl's App Vol II, p 25 (AROF).) Accordingly, while Vectren now claims that the gain on the MLI asset sale should not be included in MLI's tax base, MLI's as-filed returns properly reported this gain as part of the tax base, and MLI did not file any amended returns.

Treasury's Audit

Treasury performed a Michigan Business Tax audit for the period January 1, 2010 through March 31, 2011 (hereinafter, "audit period"). (Pl's App Vol II, p 23 (AROF).) In reviewing the sales factor apportionment, the auditor determined, among other things, that MLI overstated sales everywhere (sales denominator) for the 2011 tax period by including the gain from Schedule D and proceeds from the sale of business property. (*Id.* at 25.) By improperly including the sale of the business as part of the denominator, the auditor determined that the denominator was overstated by approximately $77,372,495, which lowered the sales apportionment factor by approximately 54.9711%. (*Id.*; App Vol II, pp 310–311 (Audit Workbook).) On April 4, 2016, Treasury issued a notice of intent to assess, assessment no. U071593. (App Vol II, pp 319–320.)

Request for Alternative Apportionment

Contrary to Vectren's statement that MLI "timely requested the use of an alternative apportionment method" (Ex F, Pl's COA Br, p 12), Vectren did not originally request alternative apportionment, but instead merely used its preferred method (including gains from business sale in the sales denominator) on its 2011 MBT return. Then, *seeking forgiveness instead of permission*, after the audit and following receipt of Treasury's notice of intent to assess, MLI formally requested alternative apportionment by letter dated June 24, 2016. (Pl's App Vol VII, pp 115–122.) MLI later supplemented its request with additional information and a letter dated December 14, 2016. (App Vol II, pp 321–328.) On February 8, 2017,

Treasury denied MLI's alternative apportionment request. (Pl's App Vol VII, pp 124–126.)

In its request for alternative apportionment, MLI requested that Treasury treat all of the receipts and income resulting from its sale of its stock under IRC § 338(h)(10) as sales under MCL 208.1115(1), and sourced to Minnesota. (*Id.* at 115–122 (June 2016 Alt Req).) MLI thus requested alternative apportionment for what it already reported in its 2011 MBT return. In the alternative, MLI requested that all of the receipts and income resulting from the sale of its business under IRC § 338(h)(10) be treated as non-operational, non-business receipts and income not subject to tax or includible in the apportionable tax bases in Michigan. (*Id.*)

Treasury denied MLI's request for alternative apportionment, as MLI failed to provide sufficient information and documentation to support alternative apportionment under MCL 208.1309. MLI was required to prove by clear and cogent evidence that the formula does not fairly represent the taxpayer's business activity in this state and leads to a grossly distorted result. See MCL 208.1309. But MLI failed to provide "any evidence to the Department that the business activities in Michigan did not contribute to the gain realized or that the formula does not provide Michigan with an equitable allocation of income." (Pl's App Vol VII, p 125 (Treasury Denial).) Accordingly, MLI's request for alternative apportionment was denied. On March 23, 2017, Treasury issued a final assessment. (*Id.* at 128–129.)

Vectren, as successor-in-interest to MLI, appealed from the final assessment to the Michigan Court of Claims.

Court of Claims proceedings

Vectren alleged four counts below. First, it alleged that Michigan's apportionment formula as applied to the sale of MLI violates the Commerce Clause and Due Process Clause because it is out of all appropriate proportion to the business transacted and activities conducted in Michigan. (Pl's App Vol VII, pp 97–103, ¶¶ 30–63, (Am Compl).) Second, in the alternative, Vectren alleged that the gain from the sale of MLI's stock is non-apportionable and non-business income, and that its inclusion in the MBT tax base results in taxation of extraterritorial values in violation of the Equal Protection, Due Process, and Commerce Clauses. (*Id.* at 103–105, ¶¶ 64–78.) Third, Vectren alleged that MLI was sold by its shareholders, and, therefore, is not considered business activity of the entity, for which reason any gains on the sale of the business are not subject to MBT. (*Id.* at 106–108, ¶¶ 79–95.) Fourth, Vectren alleged that even if MLI was liable for additional MBT tax, it should not be subject to a penalty because MLI's delay in not paying the additional tax was due to reasonable cause and not willful neglect. (*Id.* at 108–109, ¶¶ 96–102.)

The parties filed cross motions for summary disposition. On August 14, 2018, the Court of Claims granted Treasury's motion, finding that the asset sale was attributable to MLI's business activities and reported separately to its shareholder, for which reason it constituted "business income." (Pl's App Vol I, pp 8–9 (COC

Op).) Further, Vectren had not demonstrated that the MBTA's apportionment formula had distorted MLI's Michigan business activity ("[Vectren] does not dispute [MLI's] sales in Michigan for the 2011 Short Year, nor does Vectren dispute the validity of the sales-apportionment formula"), but instead that number manipulation could lead to a smaller liability. (*Id.* at 11.) And while the court rejected that there was taxation beyond Michigan's borders, it noted that even had Vectren made this showing, some extraterritorial taxation "does not amount to a constitutional violation." (*Id.* at 13.) Finally, the court rejected Vectren's argument that the penalty should be waived. "Although [MLI] requested, in accordance with Rule 205.013(3), a penalty waiver in its request for informal conference, the request was conclusory and it failed to state, in any meaningful fashion, the reasons relied in support of the penalty waiver." (*Id.* at 15.)

Vectren, as successor-in-interest to MLI, appealed. The Court of Appeals reversed, relying heavily on Vectren's attorney representations as memorialized in a letter to Treasury. Specifically, the Court found that "[t]he value of [MLI's] business and its assets was built up over many years and attributable to activity in many states." (Ex A, p 5.) The Court reasoned that an unproven historical 7-percent Michigan sales figure in past years (as compared to "70 percent of the gain of the Sale") is "evidence that well over a majority of the value inherent in MLI stemmed, not from its activity in Michigan during the Short Year . . . but from intangible assets built-up [sic] in multiple other states over time." (*Id.* at 7.) Yet the only piece of "evidence" that Vectren proffered for the historical 7-percent sales

figure was a "Letter Request" drafted by Vectren's counsel "explain[ing] its filing methodology," and "that the standard method was distortive." (Ex E, p 12; Pl's App Vol VII, pp 93–129 (Am Compl)). The Court ultimately remanded the matter "for the parties to determine an alternate method of apportionment." (Ex A, p 9.)

Treasury filed an application for leave to appeal to this Court. In lieu of granting Treasury's application, this Court vacated the Court of Appeals' opinion and remanded for a determination of whether the statutory apportionment formula was properly applied. (Ex B.) On remand, the Court of Appeals remanded the matter to the Court of Claims to decide this issue. (Ex C.) The Court of Claims agreed with Treasury's application of the statutory formula. (Ex D.) The Court of Appeals then issued an opinion and order agreeing that the statutory apportionment formula was properly applied, but that it is unconstitutional as applied against Vectren. (Ex E.) Accordingly, the Court of Appeals remanded back to the Court of Claims for proceedings consistent with both its original opinion and its opinion on remand. The same issues raised and preserved in Treasury's prior application to this Court, therefore, remain.

Treasury now renews its application for leave to appeal to this Court.

STANDARD OF REVIEW

"[A] reviewing court or tribunal must first find, upon a showing of clear and cogent evidence by the challenging party, that the total business activity attributed to Michigan is out of all appropriate proportion to the actual business transacted in this state or leads to a grossly distorted result." *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 146 (1989) (*Trinova I*).

ARGUMENT

I. This case presents a matter of significant public interest that will affect tax administration for all Michigan business taxpayers.

The Court of Appeals' published decisions encourage unhappy taxpayers to claim, without evidence, that the current value of their business is largely attributable to past business operations in other states. The decisions also create opportunism and confusion in determining an alternate apportionment method by encouraging "the parties" to essentially negotiate a method, instead of leaving approval of any such method to the statutorily assigned decisionmaker, i.e., the Department of Treasury. Finally, the decision could place a disparate tax burden on businesses with Michigan-only business operations.

For these reasons, the decision has significant public interest and warrants review by this Court. MCR 7.305(B)(2).

A. The Court of Appeals remand for "the parties" to determine an alternate apportionment method is contrary to the statute's grant of exclusive authority to Treasury to approve a method.

The Court of Appeals remanded this matter "for the parties to determine an alternate method of apportionment." (Ex A, p 9.) This means that Treasury will not – despite its exclusive statutory authority, MCL 208.1309(2)–have unilateral discretion to approve the method used, but will instead have to somehow work with Vectren to do so.

In other words, the Court of Appeals offers its imprimatur to tax administration by negotiation. Instead of the executive branch (Treasury) carrying

out its statutory duties in accordance with the law, the Court of Appeals contemplates that "the parties" can instead jointly determine an alternate apportionment method. This is a first-of-its-kind determination that contradicts the statutory scheme for alternate apportionment, will cause confusion for Treasury and amongst taxpayers, and will promote opportunism for alternate apportionment claimants seeking to reduce their tax liability.

As to Treasury, without verifiable evidence from the taxpayer as to why the sales factor apportionment results in a gross distortion, Treasury cannot evaluate alternative apportionment claims and determine a proper method of apportionment. It cannot rely on self-serving letters from a taxpayer's attorney to glean information about the taxpayer and apply the appropriate tax formula/percentage. Under the Court of Appeals' direction, Treasury's task amounts to little more than divination of tax administration, which is and has always been fact-based. In short, Treasury needs guidance.

As for taxpayers, evidence of confusion and opportunism is already present in the Michigan Tax Tribunal as a result of the Court of Appeals' published opinion. Specifically, in a case involving an alternative apportionment request by a taxpayer seeking to eliminate partnership income from its tax base, the petitioner filed exceptions with a recent Tribunal decision, requesting guidance as to *Vectren's* application as follows:

> Supported by the recent decision in *Vectren Infrastructure Services Corp. v. the Department of Treasury*, Petitioner agrees with the Tribunal that alternative apportionment is the only appropriate remedy in this matter and that Petitioner and the Department are the

> two parties who can most effectively effectuate this solution; however, Petitioner respectfully requests additional guidance or instruction to the parties illustrating what constitutes "good faith" and an acceptable resolution for purposes of approving an alternative apportionment methodology . . . . [Ex G, p 13, Pet'r's Exceptions, *United States Steele Corp v Mich Dep't of Treasury*, MTT Docket No. 18-001253-TT.)[5]

In other words, the petitioner seeks guidance on *Vectren*'s application, essentially requesting a court-sanctioned "good faith" negotiation with Treasury, despite there being no reference to negotiation or mediation in the statute. Any lack of clarity concerning this process should be resolved by *this Court*, not the Michigan Tax Tribunal.

B. The Court of Appeals' decisions could place a disparate tax burden on businesses with Michigan-only business operations.

By giving the opportunity for manipulation and tax breaks to companies with out-of-state operations, these decisions could result in disproportionately higher taxation of those entities that have strictly Michigan-based operations. The Court of Appeals, therefore, created an ironic tension that must be resolved by this Court: by finding without evidence that the standard MBTA apportionment formula ran afoul of the Commerce Clause as applied to Vectren, the Court created a roadmap for certain Michigan businesses (with out-of-state operations) to achieve better tax outcomes than others (those that operate only in Michigan), which itself could raise Commerce Clause problems. In other words, the supposed constitutional "cure" to a

[5] This matter has since been dismissed by the parties.

purported constitutional "disease" may create an actual constitutional disease when there previously was none.

For these reasons, the Court of Appeals' decision warrants this Court's review.

II. This case involves legal principles of major significance to the State's jurisprudence.

This case involves legal principles of major significance to this State's jurisprudence for five independent reasons: first, this is the first time a Michigan court has determined that in analyzing the fairness of taxation in a given tax period, the measure is not the time period at issue but instead a prior time period. Second, the Court of Appeals adopted what amounts to a "geographical accounting" analysis that the U.S. Supreme Court and this Court have rejected. Third, this is the first time a Michigan court has found that a single-sales factor formula is unconstitutional as applied. Fourth, the Court of Appeals' decision rests on attorney representations that are not evidence, and, therefore, cuts against well-established principles concerning the burden of proof in tax cases and evidentiary substance and procedure generally. Fifth, the decision conflicts with the MBTA by remanding the matter "for the parties to determine an alternate method of apportionment" when the statute places that authority exclusively with Treasury.

For these reasons, this case merits review by this Court. MCR 7.305(B)(3).

A. The Court of Appeals' decisions are the first to examine prior years' purported business activity to determine constitutionality of taxation for a given tax period, and grant alternative apportionment despite a lack of evidence showing what portion of the entity's income is attributable to the state.

The MBTA's apportionment factor, which is identical to the current Corporate Income Tax formula (MCL 206.667), captures a snapshot in time (e.g., the period at issue), as measured by sales, and, therefore, is subject to change year to year. Here, Vectren does not dispute that MLI's business activity for the period at issue as reflected in Treasury's audit is correct, but instead posits a historical "geographical accounting" method that has been rejected by the U.S. Supreme Court and Michigan courts.

The MBTA requires Vectren to show that "the business activity attributed to the taxpayer in this state is out of all appropriate proportion to the actual business activity transacted in this state ***and***" that this attribution leads to a grossly distorted result. MCL 208.1309(3) (emphasis added). In other words, the word "and" indicates that Vectren must make two showings as part of the statute's conjunctive test. See *People v Oros*, 320 Mich App 146, 154 (2017). Accordingly, Vectren must first show that the business activity attributed to MLI is out of proportion to MLI's actual Michigan business activity. Then, Vectren must show a grossly distorted result or unconstitutional, extraterritorial taxation.

But Vectren acknowledges the business activity MLI had in Michigan—i.e., the Enbridge contract performed during the audit period, and Consumers Energy as being one of its biggest customers. Further, Vectren seeks to apportion MLI's income based on past years (using the word "historic" no fewer than six times in its

briefing below, see Ex F, pp 3, 30, 42–43), and points to "the goodwill developed over the 52-year history of the Company" without providing any quantifiable evidence thereof. (Ex F, pp 6, 32, 34.)

But taxation of a specific tax period considers *only that tax period*, and, thus, as in this case, the value and gain from the sale of MLI (including net working capital; property, plant & equipment; identifiable intangible assets, i.e., trade name, customer relationships, and backlog; and goodwill) as it existed at the time of the sale. See, e.g., *Trinova I*, 433 Mich at 155 (rejecting "the taxpayer's perspective [that] fair business activity representation is that which results in the lowest possible apportioned tax base and resulting tax liability."). In other words, what matters is the business activity conducted in the current year (including the Enbridge contract sales), and MLI's *current value*, i.e., *the price Vectren paid to acquire MLI* attributable to the states.

Yet Vectren has provided no evidence as to what portion of the gain from the sale of MLI is attributable to Michigan. Vague assertions of past business activities over its 52-year history are insufficient. As an example, Vectren's own witness, Bradley A. Hirsch from KPMG, acknowledged the value of MLI's identifiable intangible assets were based on future projected earnings generated by the use of those assets. (Pl's App Vol I, pp 176–177.) Thus, the question is what portion of the value of those identifiable intangible assets, based on future projected earnings at that time, are attributed to MLI's business activities in Michigan (e.g., perhaps MLI's customers in Michigan add more value than all out-of-state customers at the

time of the sale). The same inquiry would also be required of goodwill.[6] Mr. Hirsch also testified that he believed that it was possible to value those identifiable intangible assets on a state-by-state basis. (*Id.* at 173.)

But, because Vectren failed to present quantifiable evidence as to MLI's tangible and intangible assets attributable to Michigan, it is impossible to determine whether the business activity attributed to MLI through the statutory apportionment formula is "out of all appropriate proportion to the actual business activity transacted in this state and leads to a grossly distorted result . . . ." MCL 208.1309(3).

B. The Court of Appeals' decisions contradict cases decided by the U.S. Supreme Court and this Court that reject "geographic accounting."

The Court of Appeals adopted what amounts to "geographical accounting," which the U.S. Supreme Court and this Court have previously rejected. In claiming that MLI's value was generated primarily in Minnesota, Vectren essentially argued for a "geographical accounting" of its tax base, and the Court of Appeals obliged: "the majority of the activities making up MLI's fair market value at the time of the Sale had occurred outside Michigan's borders." (Ex A, p 7.)

This is paradigmatic of geographical accounting, which is the assignment of the tax base "and its principal components to separate geographic locations and to separate accounts in each State." *Trinova Corp v Dep't of Treasury*, 498 US 358,

[6] Goodwill is also valued based on future value/opportunities. (App Vol I, pp 159–160, 192–193 (Vectren 2011 10-K); Pl's App Vol I, p 185 (Hirsch Dep Tr).)

374 (1991) (*Trinova II*). But certain factors "prevent determination of the geographic location where income is generated . . . ." *Id.* at 378. Thus, the U.S. Supreme Court and Michigan courts have rejected this method of apportionment because it "does not pass constitutional muster." *Sidney Frank v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2012 (Docket No. 306742) (attached at Ex H), quoting *Corning, Inc v Dep't of Treasury*, 212 Mich App 1, 8 (1995).

Similarly, in *Trinova I*, this Court considered an apportionment of compensation that was "forty times greater than [the plaintiff's] actual Michigan compensation," as well as depreciation that was "approximately one thousand times greater than its actual Michigan depreciation." Yet this Court determined that the apportioned tax base was not "out of all appropriate proportion to [the plaintiff's] Michigan business activity or results in a grossly distorted apportionment figure." *Trinova I*, 433 Mich at 164. See also *Sidney Frank*, unpub op at 7 (Ex H, p 7), citing *Corning*, 212 Mich App at 1.

The Court of Appeals failed to account for all of this precedent, examined past years' business activity in other states, relied on geographical accounting, and determined that alternative apportionment is necessary in this case. The Court's adoption of an erroneous historical analysis, predicated on geographic accounting, for a determination of tax liability for a specific tax year is a landmark break with not only Michigan's alternative apportionment jurisprudence, but also that of the U.S. Supreme Court. For these reasons, review by this Court is warranted.

C. The Court of Appeals' decisions are the first to determine constitutionality of apportionment as applied in accordance with a single sales factor formula.

The Court of Appeals determined that the MBTA's single sales factor formula as applied to Vectren was unconstitutional. In its reasoning, the Court distinguished this case from the Michigan Supreme Court case of *Trinova I*, finding it to be "inapposite" to the single sales factor provided in the MBTA: "that the Court accepted an actual distortion of up to 1000 times greater than actual is immaterial to this case where the three-factor apportionment formula is not at issue. Rather, the MBT uses a single factor, sales." (Ex A, p 8.) See also Ex I, *Tax Notes State*, Distortion of Income in a Single-Factor Sales World, May 11, 2020, pp 729–736.

Accordingly, the Court of Appeals' decisions are the first of their kind to find unconstitutional distortion in the context of a single sales factor formula. For this reason alone, this matter warrants this Court's review.

D. The Court of Appeals' decisions cut against the presumption of taxation in Michigan tax law and relieves the taxpayer in alternative apportionment cases of the burden to defeat this presumption.

Merely saying something does not make it true. Michigan tax law (including the MBTA) and courts construing it, therefore, create a presumption in favor of taxation, and place the burden of proving claims seeking exemption from taxation with evidence. The Court of Claims properly recognized this by rejecting Vectren's unproven, attorney-proffered assertions concerning MLI's business activity as devoid of documentation and evidence.

While Vectren mentions a "Letter Request" drafted by Vectren's counsel "explain[ing] its filing methodology," and "that the standard method was distortive" (Ex F, p 12; Pl's App Vol VII, pp 93–129 (Am Compl)), the failure to provide on-point documentary evidence was fatal here. This is especially so if the "Letter Request" is the work of an attorney memorialized in a letter (neither of which are evidence) instead of a business record generated in the ordinary course of Vectren's business operations. MCR 2.110; *People v Benton*, 294 Mich App 191, 202 (2011). And none of the underlying source documents provided by Vectren give any indication of distortion.

Yet the Court of Appeals reversed, relying heavily on the unproven assertions and characterizations that the Court of Claims rejected. This decision was unique in its reliance on purported "facts" that were not supported by admissible evidence, and, therefore, were not established in the record below.

Tax statutes and Michigan courts have routinely found that the burden is on taxpayers to demonstrate entitlement to the tax treatment they seek. *Menard, Inc v Dep't of Treasury*, 302 Mich App 467 (2013). Courts have also routinely recognized that the taxpayer's burden requires substantiation of its claims with evidence. See e.g., *Andrie, Inc v Treasury Dep't*, 496 Mich 161, 168 (2014); *EBI-Detroit, Inc v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2019 (Docket No. 343932) (attached at Ex J); *TD Auto Finance, LLC v State Treasurer*, unpublished per curiam opinion of the Court of Appeals, issued February 18, 2020 (Docket No. 346467) (attached at Ex K); *Capital*

One, NA v State Treasurer, unpublished per curiam opinion of the Court of Appeals, issued August 14, 2018 (Docket No. 340635) (attached at Ex L).

The Court of Appeals' acceptance of a "Letter Request" from Vectren's attorney of record, which is not evidence, contradicts the MBTA and Michigan taxation generally and encourages unhappy taxpayers to engage in self-serving opportunism instead of providing evidence to satisfy their burden.

E. The Court of Appeals' decisions are the first of their kind to remand for an alternative apportionment method to be determined by "the parties" instead of the Department of Treasury, which is contrary to the MBTA.

The MBTA was clear that the "[a]n alternate method may be used only if it is approved by the department." MCL 208.1309(2). The Court of Appeals ignored this statutory directive by remanding "for the parties to determine an alternate method of apportionment," (Ex A, p 9), and for the trial court to "determine an appropriate alternative apportionment method *if the parties are unable to agree on one*." (Ex E, p 3 (emphasis added).) Not only does this ignore the MBTA, it also ignores that tax administration must be uniform. Quite naturally, the taxpayer is not interested in tax uniformity, but instead the best possible outcome (i.e., lowest tax liability) for itself. If one party to the joint alternate method determination has any meaningful input, it necessarily achieves a dis-uniform administration of tax policy and law as applied to itself as beneficially as possible—*over against other taxpayers*.

That is why the law leaves approval of any alternate method in the hands of a neutral executive agency charged with administering tax policy and collection in a uniform way, without the influence of a self-interested taxpayer.

In short: the *only* role for the taxpayer as to the question of alternative apportionment is to provide evidence of constitutional distortion. Upon submission of such evidence, and satisfaction of the burden to show the standard formula is unconstitutional as applied, the Department of Treasury is charged exclusively with the task of determining a proper alternative. MCL 208.1309(2). The Court of Appeals, in holding otherwise for the first time, upsets the balance of interests between taxpayers generally (who seek uniform tax administration devoid of favor) and the particular taxpayer (who seeks the most beneficial tax outcome in its favor).

III. The Court of Appeals' decisions that Plaintiff is entitled to alternative apportionment constitute clear error because taxation relates to a snapshot in time, not to the business' entire history, and the Court of Appeals relied on unproven assertions set forth in its attorney's letter.

The MBTA (and CITA) apportionment factor captures a snapshot in time, as measured by sales, and, therefore, is subject to change year-to-year. The Court of Appeals erred in looking to unproven assertions as to the past in making a determination of the appropriate tax percentage for the short tax year at issue.

Further, Vectren has not met its burden to overcome the presumption of fair representation accorded to MLI's Michigan business activity as measured by its 2011 sales. Specifically, Vectren does not dispute that MLI's business activity as reflected in Treasury's audit is correct. And despite this concession, the Court of

Appeals adopted a "geographical accounting" method that has been rejected by the U.S. Supreme Court and this Court. Finally, the Court of Appeals remand "for the parties to determine an alternate method of apportionment" (Ex A, p 9) conflicts with the MBTA (and CITA), which gives Treasury the authority to approve the alternative apportionment method.

For these reasons, the Court of Appeals' determination is clearly erroneous, and will cause material injustice. MCR 7.305(B)(5).

A. The Court of Appeals improperly engaged in an historical analysis for a specific tax year based on information that was not proffered as evidence below.

The Court, in largely adopting Vectren's arguments, did not grapple with the fact that taxation in a given year relates to the taxpayer's activities in that given year. Instead, the Court relied on historical percentages proffered by Vectren's attorney—which is not admissible evidence—and, therefore, does not prove the basis for Vectren's claims.

Specifically, the Court relied on purported "facts" that were proffered by Vectren's attorney. For example, the Court notes that Vectren's Michigan "sales [were] around 7 percent." (Ex A, p 7.) But this "fact" was derived from a purported prior "10-year average," which itself appeared only in Vectren's attorney's letter (Ex F, p 35), and is not evidence in the record. *Benton*, 294 Mich App at 202. Similarly, the Court noted that "the majority of the activities making up MLI's fair market value at the time of the Sale had occurred outside Michigan's borders." (Ex A, p 7.) But this again is an unproven assertion. To demonstrate this

proposition, Vectren would have had to itemize MLI's fair market value of business activity by each state it operated in, and show that the fair market value from non-Michigan activities exceeded the fair market value from Michigan's activities during the period at issue. But Vectren could not and cannot do this, and any attempt to do so would contradict the record evidence—its business activity in Michigan during the short year tax period is undisputed. Further, its claim that the value of the business reflects activity in other states during prior years is irrelevant and unproven. Thus, the Court erred in determining that Treasury attributed out-of-state revenue to MLI. (*Id.* at 9.)

In short, the Court cannot merely rely on unproven assertions that comport with Vectren's preferred outcome in this matter.

B. It is Vectren's burden to prove the basis for an alternative apportionment method, and it failed to submit evidence.

Vectren must prove that it is entitled to an alternative apportionment method, and it failed to do so. Instead, it proffered a letter written by its attorney with a chart showing various apportionment percentages from the past. This supposed proof does not suffice. First, this letter is not "evidence." See *Benton*, 294 Mich App at 202. Second, Vectren's later-submitted evidence did not demonstrate any basis for alternative apportionment. One rationale Vectron proffered for alternative apportionment was that MLI's tangible assets were purportedly located in other states. But it did not prove this. It offered only certain depreciation schedules that did not show where the tangible assets were located, only that MLI

unloaded certain tangible assets at the end of their useful life and depreciation value.

Similarly, the Court of Appeals relied on the proposition that Vectren had "minimal equipment and employees" and "rented most of the equipment it used and hired Michigan union employees to perform the work." (Ex A, p 2.) But these representations do not identify the specific location of specific assets, and do not otherwise indicate the overall number or value of assets located in Michigan as opposed to other states. Under MCR 2.116(G)(4), "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts . . . ." Here, there is no record evidence to support the "facts" relied upon by the Court. Nor is there any citation to authority for why these facts are relevant to the issues.

The Court of Appeals also relied on various other unproven, undocumented assertions by Vectren. Specifically, the Court noted that "[t]he value of [MLI's] business and its assets was built up over many years and attributable to activity in many states." (Ex A, p 5.) The Court repeats this unsupported proposition again, noting that an unproven 7-percent Michigan sales figure "[is] evidence that well over a majority of the value inherent in MLI stemmed, not from its activity in Michigan during the Short Year . . . but from intangible assets built-up [sic] in multiple other states over time." (*Id.* at 7.) Yet Vectren failed to provide any evidence to support such statement. Vectren's own witness, Bradley A. Hirsch, who assisted in valuing certain intangible assets of MLI and who prepared the draft

report entitled *Vectren Corporation, Valuation of Certain Identifiable Assets in Connection with the Acquisition of Minnesota Ltd, Inc. as of March 30, 2011* (see Pl's App Vol I, p 30, ¶ 7 (Hirsch Aff)), testified that KPMG did not value MLI's intangible assets on a state-by-state basis. (Pl's App Vol I, pp 173, 199 (Hirsch Dep Tr).)

The Court also stated that "much of the activity and assets involved in the Sale never had any connection to Michigan." (Ex A, p 5.) The Court characterized MLI's activity in Michigan during the tax period at issue as an "unusual concentration." (*Id*. at 7.) But Vectren never produced any documentation, or otherwise quantified with admissible evidence, the "value of the business and its assets" (*id.* at 5), MLI's Michigan sales percentage, or the purportedly lacking connection between MLI's activity and assets to Michigan. In order to determine whether MLI's activity in Michigan during the period at issue was an "unusual concentration," Vectren would have had to provide an itemized accounting of *all its activity and assets according to each state MLI operated in*—something that Vectren did not do. As the Court of Appeals acknowledged, the Court of Claims determined that "[Vectren] had failed to provide any documentary evidence in support" of its claims. (*Id.* at 3.) Yet instead of identifying the documentary evidence that the Court of Claims noted was missing, the Court of Appeals *merely accepted Vectren's claims at face value*. The Court's reliance on unproven, self-serving assertions by an appellant constitutes palpable error.

In short, Vectren's claims remain mere unproven assertions, and it was erroneous for the Court to rely on attorney representations and other "facts" that were not in the record.

C. The Court of Appeals erred in remanding this matter for "the parties to determine an alternate method of apportionment." It is Treasury's responsibility—not that of "the parties" or the Court of Claims to approve any alternative apportionment method, and Treasury cannot do so in the absence of admissible proofs from Vectron.

1. It is Treasury's exclusive authority to determine any alternative apportionment method.

The Court of Appeals initially recognized that any alternative apportionment "must ultimately be approved by the Department." (Ex A, p 8.) Yet, on the very next page of its original opinion, the Court remands the matter "for *the parties* to determine an alternative method of apportionment." (*Id.* at 9 (emphasis added).) Then, in its opinion on remand, the Court of Appeals sent the case back to the Court of Claims "with directions to determine an appropriate alternative apportionment method if the parties are unable to agree upon one." (Ex E, p 3.)

There are four problems with these directives. First, they are contrary to the statute, which gives Treasury the exclusive authority to determine an alternative method. MCL 208.1309(2). Second, this implicates separation of powers insofar as this determination lies within the province of the executive branch, not the judiciary. *Id.*; Const 1963, art 3, § 2. Third, these directives are contradictory (on the one hand, the parties must negotiate; on another hand, Treasury has authority to determine the proper method; on *yet a third hand*, the Court of Claims must

decide this question if the court-sponsored negotiations fail), and, therefore, impossible to administer on remand. Fourth, Vectren did not put in any evidence below to support its alternative methods for apportionment. Instead, it referred to an attorney-prepared letter containing various unproven assertions (which is not evidence, *Benton*, 294 Mich App at 202), as well as depreciation schedules that did not show where any assets were located.

Accordingly, the Court of Appeals' directives are legally wrong and otherwise contradictory. Further, even assuming sense could be made of these decisions, there is no basis for Treasury to make any determination as to an alternative apportionment method.

2. Treasury cannot make an alternative apportionment determination without Vectren's proofs, i.e., admissible evidence demonstrating the basis for alternative apportionment.

The Court of Appeals tasks Treasury with an impossible mission: determine an alternative method of apportionment without any facts or proof of where MLI's business activity and assets were by state, or how such activities and assets compare with MLI's activities and assets in Michigan during the period at issue. Treasury will have to divine a certain percentage from thin air. Not only is this task impossible given the lack of information, but requiring Treasury to do this also sets a dangerous precedent that allows any taxpayer unhappy with its tax liability to merely assert unfairness and disproportionality without proof thereof.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erroneously concluded that Vectren is entitled to alternative apportionment based on attorney representations instead of evidence and remanded the matter to the Court of Claims for "the parties" to determine a proper method, or otherwise for the trial court itself to decide this question if the parties cannot. If allowed to stand, the Court of Appeals' opinion will impact the state's jurisprudence and public fisc, will favor companies with past non-Michigan business activities, and will disrupt the balance between particular taxpayers seeking special treatment and taxpayers generally.

Accordingly, Treasury respectfully requests that this Court grant this application for leave to appeal.

Respectfully submitted,

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